

Case No. SC86236

IN THE MISSOURI SUPREME COURT

IN RE: THE MATTER OF SCOTT DYER

Respondent,

v.

**THE STATE OF MISSOURI, SUB NOM. THE
CRIMINAL RECORDS REPOSITORY**

Appellant.

**REPLY BRIEF OF
THE STATE OF MISSOURI, SUB NOM. THE
CRIMINAL RECORDS REPOSITORY**

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ARGUMENT

I. Standard of Review

Dyer complains that the State has failed to clearly identify the applicable standard of review, and complains that the State's position that the case was determined in a summary judgment-like proceeding, "defies the facts." Resp. Brief at 9. In fact, the State's position is that regardless of how the case was decided below, this court should review the facts in a light favorable to the State (pursuant to ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993), or at the least, de novo. McNally v. St. Louis County Police Dept., 17 S.W.3d 614, 616 (Mo. App. E.D. 2000). State's Brief at 17-18. The deference ordinarily granted to trial courts because of their superior ability to assess the credibility of witnesses is not appropriate in this case, where the evidence of record is documentary. Id.

A. The case was not set for trial.

Dyer identifies June 2, 2004, as, "the day of trial." Resp. Brief at 8. He notes, "The State did not appear at trial and offered no evidence." Id. In fact, the docket sheet indicates in a May 5, 2004, entry that the case was set for trial on June 2, 2004. L.F. 1. Notice to the State is not reflected in the docket sheet. Id. In fact, the memorandum filed on May 5, 2004, states that the case was continued to June 2, 2004, not for trial, but merely "for submission of legal memoranda." L.F. 18.

On May 6, 2004, Dyer filed his amended petition. L.F. 1 and 21. The State filed

motions and an answer responding to the amended petition, as well as a certificate of service of discovery, on May 24, 2004. L.F. 1-2, 27-37. The prosecuting attorney filed his answer to the amended petition on June 1, 2004. L.F. 2, 38-40. The case would not have been ripe for trial on June 2, 2004, with dispositive motions and discovery pending.

Trial settings are made pursuant to Rule 63.02, which provides that in multiple-judge circuits, civil actions shall be set for trial in accordance with the rules of the court. St. Louis County Local Rule 36.1 (West Mo. Ct. Rule 2004 Volume III, page 804), provides that the judge of the division to which the case is assigned shall set the trial date. Except for the May 5, 2004, entry on the docket sheet no trial was set. No notice of this June 2 setting was given to the State. No document in the file supports the June 2 trial setting. The only document in the file dated May 5, 2004, states that legal memoranda are to be submitted by June 2, 2004. L.F. 18.

Under the circumstances, whatever was done on June 2, 2004, with discovery pending, no notice, and no record, was not a trial as contemplated by Rule 63.02.

B. The case was not tried.

The June 2, 2004, docket sheet entry states that trial was had on June 2, 2004. L.F. 2. It also states that the affidavit of the petitioner and exhibits were filed. Id. No transcript was kept of any trial, however. Correspondence of the Circuit Clerk's office by Vinson Raybon, filed in lieu of the transcript on September 29, 2004. In his statement of facts, presumably prepared in accord with Rule 84.04(c), Dyer provides this court with no summary of the

testimony of any witness who may have testified. Instead, the parties agree that the factual matters of this case are framed by the exhibits filed by Dyer. Resp. Brief at 7, n.2, citing State's Brief at 17. Submitting a case on affidavits and exhibits sounds in summary judgment. Rule 74.04(c)(1).

C. Conclusion

There is no real dispute as to what happened in this case. Regardless of the niceties of the Rules of Civil Procedure, this case was decided on a set of facts that are known to all the parties and set forth in the record. Regardless of the standard of review applied by this court, the judgment must be reversed.

II. **Dyer pled guilty, was found guilty, and is guilty.**

Dyer complains bitterly that he was never found guilty of forgery and stealing. Resp. Brief at 10. His arguments are not well founded on the facts or the law.

A. The factual basis requirement.

It is undisputed that Dyer entered a plea of guilty to the felony offenses of forgery and stealing over \$150. L.F. 49. Dyer complains, however, that the court did not actually find him guilty. Resp. Brief at 10, 19-20. He bases his claim on the sentencing form, though it reflects that he pled guilty. L.F. 48. The fact of the matter is the trial court accepted the plea of guilty. L.F. 49. A trial court cannot accept a guilty plea unless it is satisfied that there is a

factual basis for the plea. Rule 24.02(e). If the court is not satisfied that there is a factual basis for the plea, it must reject the plea. Smith v. State, 141 S.W.3d 108 (Mo. App. S.D. 2004). The trial court, therefore, must have found a factual basis for Dyer's guilty plea.

Dyer suggests that a plea of guilty carries less weight than a finding of guilt, without citation to any authority for that proposition. Resp. Brief at 10-11. In fact, a person found guilty after trial enjoys rights of appeal and further review not available to a person who has voluntarily admitted their culpability for a crime. See Rule 30 (criminal appeals), Rule 29.15 (post-conviction relief), and Rule 91 (habeas corpus). Occasionally a person is allowed to plead guilty pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), and does so without admitting some or all of the elements of the crime. But in Missouri trial courts must still find a factual basis for the Alford plea under Rule 24.02(e). Smith, 141 S.W.3d at 111. Finally, there is no suggestion in this case that Dyer entered an Alford plea.

Again, unless the criminal court in this case was convinced that there was a factual basis for the plea, it was obligated to reject the plea. That assures this court that there was a factual basis for Dyer's guilty plea.

B. Imposition of sentence cannot be suspended without a finding of guilt.

Dyer's suggestion in his brief (page 10, note 4) that a court might suspend imposition of sentence in cases where a guilty plea might not be justified is contrary to Missouri law. It violates Rule 24.02(e). It also violates § 557.011.2 RSMo., which states:

Whenever any person has been found guilty of a felony or a

misdemeanor the court shall make one or more of the following dispositions of the offender in any appropriate combination. The court may:

(1) Sentence the person to a term of imprisonment as authorized by chapter 558, RSMo;

(2) Sentence the person to pay a fine as authorized by chapter 560, RSMo;

(3) Suspend the imposition of sentence, with or without placing the person on probation;

(4) Pronounce sentence and suspend its execution, placing the person on probation;

(5) Impose a period of detention as a condition of probation, as authorized by section 559.026, RSMo.

(Emphasis added.)

Unless the criminal court had found Dyer guilty, it could not have suspended imposition of sentence. Dyer's claims in his statement of facts that he pled guilty with the "understanding" that imposition of sentence would be suspended on certain terms is not supported by the record, but is a reasonable explanation of the record. Resp. Brief at 6. By operation of law, however, Dyer could not have received that disposition unless the trial court found him guilty. § 557.011.2 RSMo.

III. Neither Common Law nor Equitable Expungement help Dyer.

The State has no quarrel with Dyer's proposition that the common law of England is the law of this state, unless abrogated by statute. § 1.010 RSMo; Resp. Brief at 12.¹ The State relies on the authorities in its principal brief for the proposition that the common law does not recognize expungement. Further, the legislature's intent to abrogate any common law right to expungement, as well as prohibit equitable expungement, is direct and specific:

Except as provided by sections 610.122 to 610.126, the courts of this state shall have no legal or equitable authority to close or expunge any arrest record.

§ 610.126.2 RSMo.

Statutory expungement is the only expungement available in Missouri. And Dyer is ineligible for relief under the terms of statutory expungement. State's Brief at 24-26.

IV. The Constitutional Issues.

The State stands on the issues it has raised as to constitutionality. Dyer does not argue in his brief that his equal protection rights, due process rights, or right to protection from double jeopardy were violated by the adoption of HB 135 in 1995. Dyer instead focuses on the what he perceives are procedural defects in the adoption of HB 135, and its purported "retroactive application."

¹ In fact, counsel for the State was counsel for the appellant in Wince v. McGarran, 972 S.W.2d 641 (Mo. App. S.D. 1998), cited in Resp. Brief at 12.

A. Procedural Issues.

Dyer claims that HB 135 lacked a clear title and involved more than one subject, but cites no authority for his arguments. As pointed out by the State in its brief, the record is devoid of evidence that would support his arguments, the trial court's judgment, or this court's examination of the issues. State's Brief at 34-35.

Further, Dyer chose not to respond to the State's explanation that all of the statutes amended by HB 135 create exceptions to this State's policy that calls for open records. § 610.011 RSMo; State's Brief at 38, n. 5.

Finally, Dyer's explanation of the difference between "procedural defects" and "substantive law" are not helpful. Resp. Brief at 25. The State's Brief at 38 admits substantial alterations to the statutes effected by HB 135 – but the questions about clear title and involving more than one subject are procedural issues related to the bill. State's Brief at 33-38.

B. Retroactive Application

Dyer's belief that he had a right to expunge his arrest records between 1990 and 1995 is mistaken, as discussed in the State's Brief at 19-26. But even if he had such a right, his failure to perfect that right prior to the enactment of the 1995 amendments to the expungement law prevent him from claiming HB 135 was retrospective in application. As discussed in the State's brief at 38-39, a retrospective law is one that affects substantive or vested rights. Dyer never sought to exercise any right under any expungement theory until he

filed his original expungement petition on March 26, 2004. L.F. 3.

CONCLUSION

Dyer has wholly failed to justify the trial court's decision in this matter in light of the authorities and arguments raised by the State. The judgement of the trial court must be reversed, as set out in the State's principle brief.

Respectfully submitted

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 2nd day of February, 2005, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 2,258 words.

The undersigned finally certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

David F. Barrett

APPENDIX

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